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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1100

NORTHERN FREIGHT LINES, INC., ET AL.,
Appellants,

v.

UNITED STATES OF AMERICA, ET AL.,
Appellees.

On Appeal from the United States District Court for the Northern District of Georgia, Atlanta Division

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JURISDICTIONAL STATEMENT

Appellants, Northern Freight Lines, Inc., Pike Transfer Co., Inc., Carolina Freight Carriers Corp., Consolidated Freightways Corporation of Delaware, Roadway Express, Inc., Southern Motor Carriers Rate Conference, Inc., Central and Southern Motor Freight Tariff Association, Inc., Middle Atlantic Conference, Rocky Mountain Motor Tariff Bureau, Niagara Frontier Tariff Bureau, Inc., Eastern Central Motor Carriers Association, Southwestern Motor Freight Bureau, National Motor Freight Traffic Association, American Trucking Associations, Inc., Regular Common Carrier Conference of American Trucking Associations, Inc., Carolina Delivery Service Co., Inc., Film Service, Inc., Indiana Transit Service, Inc., Iowa Film Delivery, and Theatres Service Company, appeal from the judgment of the United States District

Court for the Northern District of Georgia, Atlanta Division, entered on September 16, 1969, denying their action to suspend, annul, and set aside a report and order of the Interstate Commerce Commission, decided December 5, 1967, finding that the terminal area pickup, delivery, and transfer service by motor vehicle of express companies, and specifically those of Railway Express Agency, Inc., is exempt from all provisions of the Interstate Commerce Act within the Commission's jurisdiction, and is not subject to lawfully published terminal area regulations. Appellants submit this statement to demonstrate that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the District Court for the Northern District of Georgia, Atlanta Division, is reported at 304 F. Supp. 536 (adv. sheets), and a copy of the opinion appears as Appendix A hereto. A copy of the judgment of the District Court from which this appeal is taken appears as Appendix B hereto. A copy of the report and order of the Interstate Commerce Commission in *Express Company Terminal Areas*, 332 I.C.C. 91, is attached hereto as Appendix C.

JURISDICTION

This suit was brought under 28 U.S.C. § 1336 to enjoin and set aside the report and order of the Commission. (App. C) The judgment of the District Court for the Northern District of Georgia (Atlanta Division) was entered September 16, 1969, and notice of appeal was filed October 1, 1969. By orders of this Court dated November 28 and December 19, 1969, the time for docketing this appeal was extended to and including January 30, 1970. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by sections 1253 and 2101(b) of the Judicial Code, 28

U.S.C. §§ 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *American Trucking Associations, Inc.* v. *Atchison, T. & S. F. Ry.*, 387 U. S. 397 (1967); *United States* v. *Drum*, 368 U.S. 370 (1962); *Frozen Food Express, Inc.* v. *United States*, 351 U.S. 40 (1956).

STATUTES INVOLVED

The National Transportation Policy, 49 U.S.C., preceding §§ 1, 301, 901 and 1001, and sections 202(c), 203(a)(9) and (14), 206(a)(1), 207(a), and 208(a) of the Interstate Commerce Act, 49 U.S.C. §§ 302(c), 303(a)(9) and (14), 306(a)(1), 307(a), and 308(a), are reproduced in Appendix D hereto.

QUESTIONS PRESENTED

The questions presented by this appeal are:

1. Whether the District Court erred in sustaining a report and order of the Interstate Commerce Commission holding without regard of evidence to the contrary that Railway Express Agency, Inc., provides a distinctive service meriting different terminal area treatment than that received by ordinary motor carriers of freight?

2. Whether the District Court erred in sustaining a report and order of the Interstate Commerce Commission holding that Railway Express Agency, Inc., a wholly-owned railroad subsidiary, is free to extend terminal-area service incidental to line-haul motor vehicle movements, in the absence of "special circumstances" such as disclosed in *American Trucking Associations, Inc.* v. *United States*, 355 U.S. 141 (1957)?

3. Whether the District Court erred in refusing to vacate its judgment herein and in failing to remand this matter to the Interstate Commerce Commission for determination of the question of ownership and control of Railway Express Agency, Inc.?

STATEMENT OF THE CASE

On March 19, 1964, on its own motion, the Interstate Commerce Commission issued a notice of proposed rulemaking instituting an investigation into terminal area transfer, pickup, and delivery service by motor vehicle, in interstate or foreign commerce, by or for express companies under Part I or Part II of the Interstate Commerce Act (49 U.S.C. § 1 *et seq.*, and § 301 *et seq.*) The order listed certain specific issues, among others, to be considered, including whether previously promulgated terminal area regulations applicable to motor carriers of property subject to Part II of the Act (the so-called MC-37 terminal area limits, now published in 49 C.F.R. § 1049) govern the extent of terminal area motor services which an express company may or should provide on traffic moving to or from the terminal area point in motor carrier line-haul service subject to Part II of the Act. Railway Express Agency, Inc. (REA) and "any other express company or companies subject to Part I of the Act" were named respondents; however, REA was the sole respondent to appear. (App. C, p. 21a)

Eleven days of hearing were held before a Hearing Examiner whose report and recommended order were served by the Commission on August 25, 1965. The Examiner's findings and conclusions were summarized in the Commission's report (App. C, p. 23a):

> "The examiner found that REA's conduct of motor carrier operations beyond the limit of MC-37 terminal areas actually constitutes the performance of line-haul motor movements for which specific authority is required, and that to the extent such operations are conducted without specific authority, they are unlawful. He further found that while REA also utilizes rail service for line-haul movements, there is no reason to vary the geographical limits of

[1] Those terminal area limits also apply to freight forwarders operating under permits from the Commission.

a terminal area according to the mode of line-haul service utilized in moving traffic to and from the terminal, and that the maximum extent of the area in which express pickup and delivery services may be performed should be the same MC-37 terminal area for both line-haul rail and motor traffic."

Exceptions to the report and recommended order were filed by REA, appellants and others replied, and the Commission heard oral argument. By its report and order dated December 5, 1967 (App. C), the Commission reversed the findings and conclusions of the Hearing Examiner and found, *inter alia*, that the terminal area transfer, collection, and delivery service by motor vehicle of express companies, and specifically of REA, is exempt from all provisions of the Interstate Commerce Act within the Commission's jurisdiction, and that the terminal area regulations applicable to other motor carriers of property may not be uniformly applied to the express operations conducted by express companies, and particularly REA, in setting their terminal areas, "although such carriers remain subject at all times to the requirements of part II of the act and our rules and regulations thereunder in all other respects so far as their motor operations and particularly their line-haul motor movements are concerned." (App. C, pp. 54a-55a).

The District Court denied appellants' complaint, holding that the Commission had a rational basis upon which to conclude that REA offered distinctive service meriting different terminal area treatment than that received by ordinary motor carriers. (App. A, pp. 16a-17a) It, therefore, found it unnecessary to decide if REA is governed under Part I or Part II of the Interstate Commerce Act as to its line-haul movement by motor vehicle. (*Ibid.*)

After the issuance of the Commission report and order subject to review herein, information came to appellants' attention through various newspaper articles respecting an apparent change in ownership and control of appellee

Railway Express Agency, Inc., which appellants believe is relevant to the Commission determination in that report and order. On November 20, 1969, appellants filed a motion with the District Court under Rule 60(b) of the Federal Rules of Civil Procedure for vacation of the District Court's final judgment to permit the filing with the Interstate Commerce Commission of an appropriate petition for reopening and reconsideration of the report and order sustained by the District Court.

Upon application of appellants, by orders dated November 28 and December 19, 1969, this Court extended the time for docketing the appeal herein to and including January 30, 1970. (App. E and F)

By order dated January 8, 1970 (App. G), the District Court overruled and denied appellants' motion for vacation of judgment.

THE QUESTIONS ARE SUBSTANTIAL

1. This case represents but one of a number of recent and continuing controversies resulting from what the Court below characterized as REA's "transition from an express carrier to a regulated motor carrier of general commodities." (App. A, p. 9a) Issues arising out of "the increasing diversification of REA's transport activity"[2] have been and continue to be involved in numerous proceedings before the Commission, and have been before the courts on several recent occasions.[3]

The growing competition of REA with the regulated motor carriers of property and the freight forwarders resulting from that diversification of REA's transport

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[2] *Denver & R.G.W.R.Co.* v. *United States*, 387 U.S. 485, 503 (1967).

[3] *Saginaw Transfer Co.* v. *United States*, 275 F. Supp. 585 (E.D. Mich. 1967); *New England Motor Rate Bureau, Inc.* v. *United States*, 254 F. Supp. 663 (D. Mass. 1966), *aff'd mem.*, 385 U.S. 203; *Auclair Transportation, Inc.* v. *United States*, 221 F. Supp 328 (D. Mass. 1963), *aff'd mem.*, 376 U.S. 514; *Saginaw Transfer Co.* v. *United States*, Civil Action No. 2964 (E.D. Mich.) (pending on briefs and oral argument).

activity is a primary factor in the instant controversy. The dissents of Commissioners Murphy, Walrath and Bush to the Commission's action herein [4] all acknowledge the evolution of REA from an "express company" to a "motor common carrier of general freight," and the increased competitive advantage the decision below gives to REA. (App. C, pp. 65a, 66a, 69a-70a) Commissioner Murphy stated the effect of the majority decision (App. C., p. 65a):

> "Thus, contrary to the findings of the majority, the demonstrated threat herein is not that the public will be deprived of service, but that REA is exercising an unfair advantage over its competitors. In looking to the future, it must be recognized that REA is changing, if not already, into a nationwide motor carrier."

In the decision and judgment here on appeal, the District Court recognized that in recent years significant changes have occurred in REA's method of operation, resulting in increasing competition between REA and the independent motor carriers and a blurring of the distinction between REA's ambivalent "express" service and ordinary freight service. This change in operation and competition, which is recorded in the Commission decisions cited and quoted below, began in 1959 with the advent of new REA management. "REA has in recent years shown great interest in obtaining, and has actively solicited, large shipments of various commodities to produce what is termed a better 'mix' with the smaller shipments traditionally handled." [6] To attract these "larger

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[4] The report and order upheld by the Court below was joined by five of the eleven members of the Commission, while three members dissented and three did not participate. (App. C, pp. 55a, 66a, 67a, 70a)

[5] App. A, p. 14a, quoting from *Freight, All Kinds, L.C.L. Container Charges—U.S.A.*, 323 I.C.C. 468, 484 (1964).

[6] App. A, p. 3a, quoting from *Express Company Terminal Areas*, App. C herein, at p. 32a.

shipments of commodities traditionally handled by motor carriers, REA has filed aggregate, unit, and volume rates,"[7] and as a result of this activity, competition between REA and the ordinary freight carriers "has been waged more vigorously and on a wider front."[8]

In *Denver & R.G.W.R. Co.* v. *United States*, *supra*, this Court noted the concern of the trucking and freight forwarding interests over the increasing diversification of REA's transport activities. In that proceeding, REA not only conceded the increasing competition, but argued that "because of the increasing cross-competition among groups carrying transport, it is impossible to categorize REA as a carrier of 'express,' . . . ."[9]

The continuing concern of the motor carriers over competition from REA stems from the fact that, despite its consideration of the question in several cases, the Commission has failed to provide meaningful distinction between "express service" and "general freight service," and has failed to clearly define the nature of the "express service" which REA may perform. In the report upheld by the District Court below, the Commission refused to consider this question, stating (1) that it had discussed it "extensively" in numerous cases, (2) that it is both collateral to and beyond the scope of the proceeding, and (3) that there is no evidence that REA "is not functioning as an express company in accordance with the criteria enunciated" in previous cases. (App. C, pp. 34a-35a) Notwithstanding the foregoing, the Commission's

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[7] App. A, p. 9a.

[8] App. A, p. 14a, quoting from *Freight, All Kinds, L.C.L. Container Charges—U.S.A.*, *supra*, 323 I.C.C. 468, at 484.

[9] 387 U.S. 502-03. REA's brief to the Court in the *Denver and Rio Grande* case included an eight-page Appendix (pp. 76-83) designed to demonstrate that "it is no longer possible to draw a clear line of demarcation between 'express' and 'ordinary freight'" (Brief, p. 78), and that REA is in direct competition "in a large area" with motor carriers and freight forwarders. (Brief, pp. 81, 83)

ultimate conclusion to treat REA differently from the motor carriers and freight forwarders in the matter of terminal area regulation rested squarely on the assumption that REA performs "express service" which is unique, and different from motor carrier freight service. After declining to consider the question of the nature of REA express service and its relation to the ordinary freight service of motor carriers, the Commission said (App. C, p. 35a):

> "Accordingly, our ultimate conclusion here must be based upon, as well as limited to, the proposition that all of the traffic handled by REA is, in fact, moving in 'express service' as that term has been defined, particularly in view of the extensive consideration previously given this matter."

And the report is studded with references to the "unique" nature or "distinctive character" of that service.[10]

Appellant motor carriers are not the only ones who are unable to find in the Commission reports language which defines REA's rapidly changing transportation activities. In *Saginaw Transfer Co.* v. *United States*,[11] the District Court struck down a Commission order approving reduced REA rates on shipments of chemicals aggregated in 20,000- and 30,000-pound lots, because of the Court's inability to determine from the report and order whether the service covered by the tariff was, in fact, express service:[12]

> "The statement of facts, conclusions, and findings of the examiner, affirmed and adopted by the Com-

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[10] *E.g.*, App. C., pp. 36a, 38a, 42a.

[11] 275 F. Supp. 585 (E.D. Mich. 1967). On reconsideration after remand, the Commission affirmed its prior conclusion that the rates in question were just, reasonable, and otherwise lawful. (335 I.C.C. 20). A motion for leave to file a supplemental complaint was filed with the District Court on October 16, 1969, but was later withdrawn because the tariff in issue was cancelled, rendering the issues moot.

[12] 275 F. Supp. 585, 589.

> mission, do not provide this Court with a basis for determining whether the result reached comports with the statutory standards and the National Transportation Policy. While conceding that respondent's authority is limited to 'commodities moving in express service,' we can find no resolution of the issue thus presented. While recognizing the legal intricacies of the matter, we do not believe that they excuse the obscurity and involution of the ruling by the agency. If we were to speculate, we might consider the findings and conclusions to mean that the distinction between 'express' and 'regular' or 'ordinary' service has ceased to exist, or, if not, that there are no meaningful criteria left by which to test either. So far as we can tell, Congress has not become aware of this hypothetical development, and has made no provision for dealing with it."

In *New England Motor Rate Bureau, Inc.* v. *United States*, 254 F. Supp. 633, 637 (D. Mass. 1966), the Court, while declining to overturn the Commission's approval of REA's rates for container service which "may not represent the highest calibre of express service," nevertheless recognized that "a service might be so far diminished as to cease to be an express service entirely."

The District Court in the decision here on review also recognized that the continuing change in REA's transportation activity may result in the elimination of any distinction between express service and general freight service (App. A, p. 11a):

> "At some point in time, REA's activities may become indistinguishable from those of ordinary motor carriers, thus subjecting REA to identical economic regulation."

Although it recognized the continuing change in the nature of REA's transportation activity, the District Court below refused to hold that the Commission acted unlawfully in failing to consider the record evidence of sub-

stantial and growing competition between REA and the general freight motor carriers: [13]

> "The ICC did not act arbitrarily in recognizing that competition was not necessarily the crucial factor in defining the terminal areas for REA. Whatever the competition involved, the ICC correctly found that REA performed a distinctive service unmatched by other carriers. *Therefore, although REA may be increasingly engaging in competition with motor carriers, this does not mean that it has lost its 'express' characteristics, . . . at least at this time.*"

No one disputes that for several years REA has been engaged in a continuing change in its transportation activities and in a transition from an express carrier to a regular motor carrier of general commodities.[14] As plaintiffs-appellants' counsel conceded at the oral argument (App. A, p. 9a), and as the dissents to the Commission report and order show (App. C, pp. 65a, 66a, 69a), the central point of dispute here was the extent to which that transition has been completed.

The question was raised before the Commission whether a difference exists between "true express service" and "general freight service," and whether REA is currently providing both, and, particularly, the latter. (App. C, p. 34a) Although evidence was offered to show the changing pattern of REA's operations and its growing competition with the motor carriers, the Commission declined to consider such evidence, relying instead upon the holdings of *prior* decisions for the proposition that "all of the traffic handled by REA is, in fact, moving in 'ex-

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[13] App. A, p. 14a, citations omitted. Emphasis added.

[14] Although arguing to the Commission in this proceeding that the Hearing Examiner did not adequately consider "the unique character" of its service (App. C, p. 24a), at the same time, even REA was urging this Court to find that "because of the increasing cross-competition among groups carrying transport, it is impossible to categorize REA as a carrier of 'express,' . . . ." *Denver & R.G.W.R. Co.* v. *United States*, *supra*, 387 U.S. 458, 503 (1967).

press service' as that term has been defined. . . ." (App. C, p. 35a)

Evidence related to rates and to "REA's intensified solicitation of larger shipments," which the Commission rejected as being of a "limited and peripheral relation to the terminal area question" (App. C, pp. 41a-42a), is directly relevant to the determination of the current nature of REA's transport activity. It was error for the Commission to exclude from its consideration these facts and circumstances which should have been considered.[15] And it was error for the District Court to affirm a Commission decision reached in disregard of such facts and circumstances.

As acknowledged by Commissioner Murphy in his dissent (App. C, p. 65a), the Commission action herein allows REA to exercise an unfair advantage over its competitors. Under this decision, REA may extend the geographic scope of its operations in competition with other motor carriers merely by publishing, on one day's notice, a new terminal area description embracing a new traffic generating point. Other motor carriers—and freight forwarders as well—that wish to offer service beyond the MC-37 terminal area limits of authorized points of service must apply for new operating authority, which applications frequently may be determined only after protracted proceedings.

The District Court stated that appellants are protected by their right to petition the Commission to undertake an investigation and suspension proceeding as to any changes in REA's terminal areas they feel are unreasonable or to file a complaint with the Commission testing particular terminal areas. (App. A, p. 16a) The effectiveness of such remedies is greatly attenuated by the large number of terminal area changes published by

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[15] *Texas & P.R. Co. v. Interstate Commerce Commission*, 162 U.S. 197, 235 (1896)

REA [16] and the time required to determine such petitions and complaints,[17] particularly in view of REA's ability to enter upon the newly extended service on one day's notice and to continue the operation until the petition or complaint is determined.

This instantaneous ability of REA to institute new motor carrier service, essentially no different from that of the numerous competing general freight motor carriers, does not comport with the requirements of the National Transportation Policy. In its total emphasis on promotion, the Commission has disregarded equally important considerations in the National Transportation Policy.

The conclusion of the District Court below that the Commission decision "provides for *fair and impartial regulation of REA* by assuring uniform terminal areas regardless of the mode of line-haul movement employed," [18] is a patent distortion of the policy requirement to "provide for *fair and impartial regulation of all modes of transportation* subject to the provisions of this act. . . ."[19] Regulation materially benefiting one carrier to the substantial detriment of competing carriers and modes simply cannot be twisted to accommodate to a requirement of fair and impartial regulation of all modes. It is clear

[16] REA's traffic witness testified at the hearing that REA published 625 changes in terminal area limits in one year, the majority being extensions. (Hearing Exh. 79, p. 5; Hearing Tr., p. 542)

[17] In *Barton Truck Line, Inc.* v. *Railway Express Agency, Inc.*, 95 M.C.C. 625 (1964), just over one year elapsed between the filing of the complaint (July 22, 1963), and the issuance of the decision of the Commission, Division 1 (August 5, 1964), finding that REA's extension of its Salt Lake City, Utah, terminal area approximately 35 miles through "[a] wide expanse of undeveloped wasteland" to embrace the Tooele Ordnance (Army) Depot was unreasonable. (95 M.C.C. at 630)

[18] App. A, p. 15a. Emphasis supplied.

[19] 49 U.S.C., preceding §§ 1, 301, 901, and 1001. Emphasis supplied. The full text of the policy is set out in Appendix D hereto.

from the District Court's statement that it did not find that the Commission weighed the impact of its decision on the motor carriers and freight forwarders which is a minimum requirement of the policy provision.

It is also evident that the Commission decision fails to consider the effect of practically unrestrained extension of REA's motor carrier service upon "safe, adequate, economical, and efficient service" and upon "sound economic conditions in transportation and among the several carriers"—goals which the Commission is required in the National Transportation Policy to promote and foster. The District Court found it significant that the motor carriers evidenced little interest in adopting REA's system of defining terminal areas by "managerial discretion." (Appendix A, p. 17) However, if all carriers were permitted to expand and alter the geographic scope of their operations at will, there is serious question whether adequate, economical, and efficient service and sound economic conditions in transportation could long survive. In fact, such "managerial discretion" would spell the end of the scheme of regulation embodied in the Act and particularly in sections 206(a)(1), 207(a), and 208(a).[20] Part II of the Interstate Commerce Act reflect a legislative judgment that the transportation needs of the nation may best be met by allowing only such motor carrier operation in interstate and foreign commerce as the Commission finds to be required. Congress took away the unrestrained freedom of entry into this nationally vital service and empowered the Commission to issue certificates of public convenience and necessity which must specify the service to be rendered, including the routes, the fixed termini, and the territory to be served. The "managerial discretion" of any carrier or group of carriers to extend or alter its prescribed service at will is antithetical to this legislative purpose.

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[20] 49 U.S.C. §§ 306(a)(1), 307(a) and 308(a), reproduced in Appendix D hereto.

As Commissioner Murphy stated in his dissent, "The touchstone of the national transportation policy contains a large element of fairness as well as promotion." (App. C, p. 65a) The Commission in its report and order sustained by the Court below, disregarded this element of fairness by its refusal to weigh the competitive consequences of its action.

2. In its report and order sustained by the Court below, the Commission found it "significant" that REA "was organized and continues to be wholly owned by a number of railroads, [and] that it operates under an agreement to which most of the Nation's railroads are parties. . . ." (Appendix C, p. 28a) This statement of REA's ownership and control was adopted by the Court below, although it noted a reference in the brief of the United States to certain news stories indicating that the railroad owners of REA had agreed to sell their stock to "'unaffiliated persons." [21]

Subsequent news stories indicated that the alleged sale of the REA stock occurred on or about August 21, 1969, under terms which gave the railroad owners, among other considerations, warrants to buy stock in a new holding company that will operate REA's express business. Because these stories indicate a possible change in the ownership and control of REA and possible consequent change in its operations and status, appellants, on November 20, 1969, filed in the District Court a motion for vacation of judgment herein to permit the filing of a petition for reopening and reconsideration with the Interstate Commerce Commission. By order dated January 8, 1970 (App. G), the District Court overruled and denied that motion.

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[21] App. A, p. 2a, esp. n. 2. Neither the decision below nor the Government brief cited refer to any Commission finding that the alleged new owners of REA are "unaffiliated" with the present rail owners or any of them.

In the District Court, appellants argued that the Commission erred also in failing to give recognition to the fact of REA's rail ownership and the clear Congressional policy of opposition to railroad incursions into the field of motor carrier service,[22] a policy applicable to REA when it seeks authority for motor carrier operations wholly disassociated from rail service.[23] The District Court rejected this contention, saying (App. A, p. 16a):

> "However, the restrictions in REA's motor certificates, discussed above, protect against unwarranted intrusions. In addition, since REA's motor carrier service acts as a supplement to declining line-haul movement by rail, the extension of motor carrier service is related to the rail activities of REA's owners. See *Nashua*, *supra*, at 339-340."

The restrictions referred to are those which "recognize the express nature of REA's operations. . . ." (App. A, p. 16a) In the first part of this argument, we have shown the inadequate protection given by the "express" restrictions against the continuing expansion of REA's transportation activities. Furthermore, the "express" restrictions were not designed to prevent *railroad* incursions into the field of *motor carrier service*. By its action here, the Commission has freed REA to extend, at will, its terminal area operations incidental to its *line-haul movements by motor vehicle*. The District Court erred in concluding that such extension of service "is related to the *rail activities* of REA's owners." The correct view is that stated by the District Court for the Eastern District of Michigan:[24]

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[22] *American Trucking Assocs., Inc.* v. *United States*, 364 U.S. 1 (1960).

[23] *Railway Express Agency, Inc., Ext.—Nashua, N.H.*, 91 M.C.C. 311 (1962), aff'd. *sub nom., Auclair Transportation, Inc.* v. *United States*, 221 F. Supp. 328 (D. Mass., 1964), 376 U.S. 514.

[24] In *Saginaw Transfer Co.* v. *United States*, *supra*, 275 F. Supp. at 590. (Emphasis in original)

> "While railroads should be able to use service by motor vehicle to public advantage in *their operations*, if the motor transportation is essentially unrelated to rail service, the railroad parents are invading the field of trucking; and under normal circumstances, the National Transportation Policy is thereby offended."

As the extension of terminal area operations incidental to REA's *line-haul motor movements* is not related to the *rail service* of its railroad owners, the decision herein conflicts with the requirements of that transportation policy.

As noted above, both the Commission and the Court below based their conclusions, in part, upon REA's ownership and control by the Nation's railroads. In the light of the apparent change in that ownership and control subsequent to the making of the Commission report and order herein, and while the District Court was considering this matter, as a minimum this proceeding should be remanded to the District Court below for further remand to the Commission with direction to reconsider its report and order specifically with respect to the following two questions:

(1) Has there been a change in the ownership and control of REA and in its operations and status as a result thereof; and

(2) If so, does such change in ownership, control, status, and operation require any change in the report and order herein, made December 5, 1967?

CONCLUSION

The questions presented by this appeal are substantial and of public importance. For the reasons stated, appellants urge the Court to note probable jurisdiction and to reverse the judgment of the District Court with remand to that Court for disposition consistent with the Court's opinion.

Respectfully submitted,

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